BILL 85 AMENDMENTS TO THE EMPLOYMENT STANDARDS ACT

EMPLOYMENT
STANDARDS
BULLETIN

Ontario Ministry of Labour
Ministère du Travail de l'Ontario

DECEMBER 1987

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This Bulletin sets out the amendments to the *Employment Standards Act* which were contained in Bill 85, and explains how the Employment Standards Branch will seek to apply these provisions. It is provided for convenience only. For accuracy, reference should be made to the *Employment Standards Act* and Regulations.

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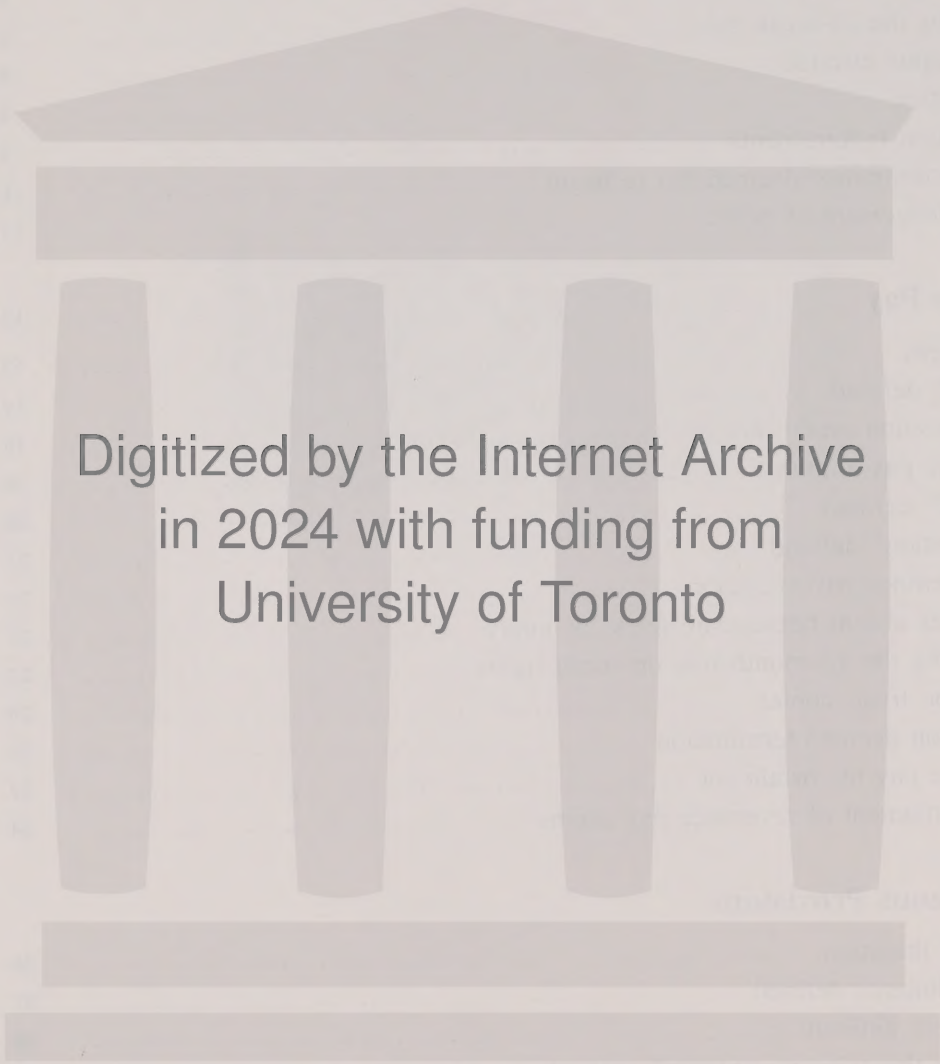

Bill 85 Amendments to the Employment Standards Act

Bill 85, an Act to amend the *Employment Standards Act*, was passed by the Legislature on June 29, 1987, and received Royal Assent on that day. The Bill had these main objectives:

- to lengthen the required notice period for most individual terminations without extending the previous eight-week maximum notice entitlement;
- to require employers to provide employees and the Minister of Labour with basic information about intended mass terminations;
- to establish a right to termination pay for employees on lengthy temporary lay-off; and
- to broaden the scope of the severance pay provisions.

Effective dates

Most Bill 85 provisions became effective June 15, 1987. The exceptions were measures dealing with notice of civil proceedings by employees, notice to the Minister of mass terminations, and interest on trust funds. These did not take effect until July 31, 1987.

Regulations concerning notice of mass terminations and providing forms for notice to the Minister and notice of civil proceedings were filed on July 31, 1987, and published in the *Ontario Gazette* of August 15, 1987. (A regulation to prescribe the rate of interest on trust funds had not been made at the time of publication of this Bulletin.)

Revisions to the Employment Standards Act

The amendments contained in Bill 85 are set out below, together with explanations and amplification where appropriate.

Part I
Notice Of Termination

Individual notice

The revised notice requirements are as follows:

S.40(1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employer gives,

(a) one week's notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks' notice in writing to the employee if his or her period of employment is one year or more but less than three years;

(c) three weeks' notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks' notice in writing to the employee if his or her period of employment is four years or more but less than five years;

e) five weeks' notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks' notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks' notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks' notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

Explanation:

The individual notice periods apply in the following situations:

a) where fewer than 50 employees at an establishment are terminated in a four-week period, or

b) where 50 or more employees at an establishment are terminated in a four-week period but do not constitute more than 10 per cent of the work force (except where the terminations are caused by the permanent discontinuance of all or part of a business).

The previous individual notice schedule was as follows:

Period of employment	Notice required
At least 3 months, less than 2 years	1 week
At least 2 years, less than 5 years	2 weeks
At least 5 years, less than 10 years	4 weeks
10 or more years	8 weeks

Comment:

- Generally speaking, individual employees now qualify for greater periods of notice at an earlier seniority date, although eight weeks' notice remains the maximum requirement.
- The aim of the revision is to provide short-service and medium-service employees with more time to look for new jobs. The revision also seeks to remove possible inequities in the application of the previous provision by graduating notice requirements in smaller steps.

Q: A four-year employee is given two weeks' notice at the end of the day on Friday, June 5, 1987, to take effect at the end of the day on Friday, June 19, 1987. Effective June 15, 1987, however, the notice requirement for a four-year employee became four weeks. Does this mean the notice period must be extended another two weeks?

A: No. The old notice periods apply if the employee was given notice before June 15. But if notice was given on or after June 15, the new notice periods apply.

Temporary lay-offs

S.40(10) If an employee is temporarily laid off, as defined in the regulations, and the lay-off commences on or after the 15th day of June, 1987 and equals or exceeds thirty-five weeks in any period of fifty-two consecutive weeks, the employee shall be deemed no longer to be temporarily laid off and, if the employee has not been given notice of termination in accordance with this section, the employee is entitled to termination pay.

Explanation:

Prior to Bill 85, workers on temporary lay-off were not entitled to notice or termination pay no matter how long the temporary lay-off lasted. Under Regulation 286, a temporary lay-off generally means a lay-off of not more than 13 weeks in any 20-week period. However, in certain circumstances a temporary lay-off may be extended beyond the 13 weeks, such as when the employer continues to maintain benefits.

Under the revision, a temporary lay-off which has been extended beyond the 13 weeks is deemed no longer to be temporary if the lay-off continues for 35 weeks or more in any 52-week period. If this occurs, and the employee did not receive proper notice of termination, the employee will be entitled to termination pay. (Note that this rule applies only to lay-offs which commenced on or after June 15, 1987.)

Comment:

This new deeming rule addresses the problem that, under Regulation 286, a temporary lay-off could be prolonged indefinitely — and the worker could be deprived of notice or termination pay — so long as the employer continued to pay benefits. A lay-off lasting 35 weeks is now taken to indicate that the loss of employment is probably permanent.

Extending the 35-week rule

S.40(11) Where an employee may be entitled to termination pay under subsection (10) is represented by a trade union, the trade union may apply to the Director in writing to extend the periods specified in subsection (10) and if the application is approved by the Director, subsection (10) shall be read as if such longer periods were specified.

Comment:

In some circumstances, requiring an employer to make immediate termination payments when a lay-off reached the 35th week could possibly create a hardship for the employer and could also create hardships for the employees, such as where the cost of providing termination pay might jeopardize the financial well-being of the employer, possibly causing further terminations. The revision recognizes this by permitting a trade union to apply for an extension of the cut-off point past 35 weeks.

Recall rights election

S.40(12) An employee who is entitled to termination pay under subsection (10) and who has a right to be recalled for employment under the terms and conditions of employment may elect to be paid the termination pay forthwith or may elect to retain the right to be recalled.

(13) Where an employee elects under subsection (12) to be paid the termination pay forthwith, the employee shall be deemed to have abandoned the right to be recalled.

(14) Where an employee entitled to make an election under subsection (12) elects to maintain the right to be recalled or fails to make an election, the employer shall pay the termination pay to the Director in trust to be paid by the Director,

(a) to the employer, where the employee accepts employment made available under the right of recall and in such case the employee shall be deemed to have abandoned the right to termination pay; or

(b) to the employee in any case other than a case mentioned in clause (a) including the case where the employee renounces the right to be recalled and, upon payment, the employee shall be deemed to have abandoned the right to be recalled.

Explanation:

Where an employee who has recall rights becomes entitled to termination pay as a result of a temporary lay-off going on for 35 weeks or longer, subsection 40(12) gives the employee a choice between:

a) giving up recall rights and getting termination pay immediately, or

b) retaining recall rights and having the employer pay the termination pay to the Director of Employment Standards in trust.

If the employee chooses to be paid immediately, subsection 40(13) deems that individual to have abandoned the recall rights.

If the employee chooses to retain recall rights and later accepts a recall, clause (a) of subsection 40(14) requires that the termination pay being held in trust be paid back to the employer. Otherwise, the money stays in trust until the recall rights expire or the employee changes the election — at which time clause (b) of subsection 40(14) requires that the money be paid to the employee.

Comment:

- These provisions mirror those dealing with the election between immediate receipt of severance pay and retention of recall rights found in section 40a of the Act. They reflect the view that if employees are getting a new right to termination pay where a lay-off goes on for as long as 35 weeks, they should not be able to have the benefit of both termination pay and recall rights. Rather, they should have to choose between the two.
- At the same time, it was recognized that the recall rights may or may not ever be worth something. Therefore, the employer is required to pay the termination pay into trust and would get it back if the employee subsequently accepted a recall. But if the recall rights expired, or the employee underwent a change of mind, the termination pay would be paid to the employee.

Q: Does the money paid into trust earn interest?

A: Yes. This is returned to the employer or the employee with the principal.

Mass notice

Any employer who plans to terminate 50 or more employees at an establishment in any period of four weeks or less is required under S.40(2) to provide the employees with notice in the manner prescribed in the regulations. The following subsections further provide that:

S.40(2a) Where so prescribed, an employer who is required to give notice by subsection (2),

(a) shall provide to the Minister, in the prescribed form, such information as may be prescribed; and

(b) shall, on the first day of the statutory notice period, post in the employer's establishment, in the prescribed form, such information as may be prescribed.

(2b) The employer shall post the information required by clause (2a) (b) in one or more conspicuous places in the employer's establishment where it is most likely to come to the attention of the affected employees and the employer shall keep the information posted throughout the statutory notice period.

The notice referred to in clause (2a)(a) is to be given on Form 1 (0.Reg. 444/87).

Comment:

- By requiring employers to provide specific information in a prescribed manner, the Minister is in a better position to know the facts relating to large scale cutbacks and closures.
- The use of a form helps to ensure that all pertinent information is obtained and also facilitates statistical analysis.
- The posting of the notice in the employer's place of business allows all affected employees to see what steps are being taken to assist them.

Information requirements

S.40(2c) The information required under subsection (2a) may include,

(a) the economic circumstances surrounding the intended termination;

(b) any consultations which have been or are proposed to take place with local communities or with the affected employees or their agent in connection with the terminations;

(c) proposed adjustment measures and the number of employees expected to benefit from each; and

(d) a statistical profile of the affected employees.

Explanation:

This provision sets out the kinds of information that may be required in the notice to the Minister and employees under the previous provisions. This basic information must be received by the Minister before the notice clock starts running, and will ensure that the Minister is in a position to explore alternatives to mass lay-offs or closures and/or facilitate appropriate adjustment measures.

Comment:

- The regulations spell out in more detail the kind of information that is required to be given to the Minister. For example, the employer is asked to outline proposed adjustment measures required by statute, by collective agreement, and by company policy.
- A statistical profile of the affected employees will include age group, occupation, length of service, and so on.
- Having as much information about the affected employees as possible, and as early as possible, will assist the Ministry to address the employees' needs and will highlight special problem areas.
- If all the information is not readily available, the employer will be required to submit it as soon as possible.
- Notice to the Minister should be forwarded to the Office of the Director of the Employment Adjustment Branch (formerly the Plant Closure Review and Employment Adjustment Branch), 400 University Avenue, Toronto, M7A 1T7 (416-965-0853) between the hours of 9 a.m. and 4 p.m. from Monday to Friday.
- Details concerning the provisions respecting notice to the Minister may be obtained from the Employment Adjustment Branch.

Termination notice deemed not to begin

S.40(2d) Notwithstanding subsection (2), the notice required under subsection (2) shall be deemed not to have been given until the date the completed form required under clause (2a) (a) is received by the Minister.

Comment:

- The notice clock for the employees' notice does not start ticking until the Minister of Labour has all the basic information from the employer.
- Since the required notice of termination will not be deemed in effect until the required information is submitted to the Minister, it will be in the interest of the employer to provide such information prior to or at the time of the notice to the employees.

Acknowledgement of notice

The following subsections set out an administrative scheme for recording the Minister's receipt of the notice of mass termination.

S.40(2e) The Minister shall cause every form received in his or her office under clause (2a) (a) to be endorsed with a memorandum of the date of its receipt.

(2f) Where the completed form required under clause (2a) (a) has been received, the Minister shall cause a notice to that effect to be sent to the employer within two business days of such receipt.

(2g) A copy of the memorandum referred to in subsection (2e) purporting to be certified by the Minister is, without proof of the signature of the Minister, evidence of the date the form was received.

Explanation:

These provisions set out an administrative scheme for recording the Minister's receipt of the notice of mass termination. The employer will know that the Minister has received the notice because the Minister is required to acknowledge receipt within two business days.

Subsection (2g) provides that where the time of the Minister's receipt of the notice is put in issue, a memorandum certified by the Minister and stating the time of receipt of the notice may be used as evidence.

Comment:

- It is important that the time and date of receipt of the form be officially logged so there can be no dispute about the legitimacy of the notice to affected employees.
- The employer will be notified in writing that the form has been received within two business days. While the employer does not have to wait for acknowledgment before giving notice to employees, it may be prudent for the employer to do so, since the notice to the employees does not start running until the form is received.
- In practice, the employer will also be promptly notified by telephone or Telex by the Ministry, with the written confirmation to follow within two days.

Part II
Severance Pay

Entitlement

Under the previous legislation, employers were required to pay severance pay only when 50 or more workers were terminated in a six-month period as a consequence of the permanent discontinuance of all or part of the employer's business at an establishment. The following provision retains the old entitlement but also extends eligibility for severance pay to individual employees in certain circumstances.

S.40a(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Explanation:

This is the main severance pay entitlement measure. It provides two ways of qualifying for severance pay, compared to only one before. An employee still qualifies of permanent business discontinuance. In addition, individual terminations now qualify if the employer has an annual payroll of $2.5 million or more, provided the employee qualifies in other respects as well (e.g., five years or more of employment).

Comment:

- The effect of this provision is to extend severance pay, not only to workers terminated as a result of a permanent discontinuance situation, but to workers terminated for any reason (subject to specific exemptions), provided that the years of employment and payroll criteria are met.
- The $2.5 million payroll criterion recognizes that small businesses often lack the human resource and financial management capability to plan effectively for severance pay contingencies.

- The 5 years' employment requirement is maintained. The losses for which severance pay compensates (e.g. lost seniority privileges, reduced pension entitlements, reduced value of firm-specific skills) do not significantly accrue until there has been fairly long employment.

Q: If an employer with a payroll of at least $2.5 million terminated only one employee, could that employee get severance pay even though no part of the business was being discontinued?

A: Yes.

Q: Why have 2 different ways of becoming entitled to severance pay? Why not just eliminate the permanent discontinuance/50 terminations aspect?

A: There may be some cases in which an employer permanently discontinues all or part of his business terminating 50 or more employees but has a payroll of less than $2.5 million. The government did not want to see any employees who would have had an entitlement under the previous legislation lose it because of the changes made by the bill.

"Payroll" defined

S.1(ja) "payroll" means, in respect of an employer, the greater of,

(i) the wages earned by employees in the twelve-month period ending the last day of the last fiscal year established by the employer that ended prior to the termination of an employee's employment,

(ii) the wages earned by employees in the twelve-month period ending on the last day of the second last fiscal year established by the employer that ended prior to the termination of an employee's employment, or

(iii) the wages earned by employees in the four weeks that ended with the last day of the last pay period completed prior to the termination of an employee's employment, multiplied by 13;

Explanation:

The clause sets out a definition of "payroll" for use in connection with the new right to severance pay for employees terminated by a employer with a payroll of $2.5 million or more. The definition looks at the "wages" paid to employees during three periods and defines the payroll as the *largest* of these. The three periods are:

- wages for the last complete fiscal year,
- wages for the second-last complete fiscal year, and
- current wages on a projected annual basis.

The term "wages" includes all monetary remuneration payable by an employer to employees, but does not include benefits, expenses, tips or discretionary bonuses.

Comment:

- The definition looks to three different figures in order to ensure that employers undergoing expansion or contraction at close to the $2.5 million level do not unfairly escape severance pay liability.
- For example, a company might have had a $2.5 million payroll in its second-last fiscal year, but not in its last fiscal year if it has been shedding staff all the while. In this situation, it would hardly be fair if employees terminated earlier got severance pay but those being terminated later did not.
- Similarily, a business may not have had a $2.5 million payroll last year or the year before, yet, if it has been undergoing rapid expansion in the current year,

it may have reached a size where it is appropriate for it to pay severance pay. Hence, even if the last 2 fiscal years did not have $2.5 million payrolls, the employer will have to pay severance pay if a qualified employee is terminated and the previous four weeks' wages for all employees, multiplied by 13 (to project a 52–week figure), equal at least $2.5 million.

- Where associated or related businesses can be treated as one employer under the amended section 12 of the Act (see below), their payrolls can be added together for purposes of the $2.5 million test.

Q: Does the calculation of payroll concern Ontario employees only, or does "payroll" include wages paid to employees in other jurisdictions?

A: Only the wages of employees falling within Ontario jurisdiction are included in the calculation of payroll.

Q: Does the $2.5 million payroll rule cover the payroll of one "establishment" only?

A: No. The employer's payroll is determined by totalling the wages paid to *all* of its Ontario employees, regardless of whether they are working at the same establishment or not. The establishment concept has nothing to do with the $2.5 million payroll rule.

Q: Did Bill 85 in any way resolve the controversy over whether employees who are exempt from severance pay are nevertheless included in the "count" of 50 or more terminations? And do the wages of exempt employees figure in the calculation of the employer's payroll?

A: Bill 85 provided for these matters to be addressed through a regulation, which will be put in place at a future date.

Q: What is the Ministry's view on whether exempt employees are in for the count?

A: In the past, the Ministry has taken the position that exempt employees were in for the count, generally speaking. However, particular fact situations and the nature of specific exemptions may alter this general thrust.

Single location establishment

S.40a(1b) Where,

(a) there is a permanent discontinuance of all or part of the business of an employer at a location which is part of an establishment consisting of two or more locations; and

(b) fifty or more shall have their employment terminated in a period of six months or less because of the permanent discontinuance,

the location shall be deemed to be an establishment for the purpose of determining the rights of the employees employed at that location under this section.

Explanation:

This provision deems a single location to be an establishment, even if it would only be a *part* of a larger establishment under the new definition of establishment (see below) — if the company permanently discontinued all or part of its business at the location and 50 or more terminations resulted. The provision is applied in determining the rights of the employees at the location concerned.

The provision is necessary to ensure that no one who would have had a severance pay entitlement under the old law would not get an entitlement under the new law as a result of the new definition of "establishment".

Comment:

- It is expected that most locations of an employer which were separate establishments before the definition will remain so after, and *vice versa*. (The principle advantage of the definition will be greater clarity and certainty in the law.) However, in the odd case the definition could change things, and to ensure that no one loses any rights they would otherwise have had, subsection 40a(1b) will apply.

Q: Consider the case of a company that had a payroll of under $2.5 million and carried on business at two locations in a single municipality. What would be the situation if it closed one of them and moved *all* production to the other location, terminating 50 or more employees in the process? Would the terminated employees lose out on severance pay because, although the two locations constituted a single establishment, there had been no permanent discontinuance of all or part of the business at the establishment?

A: No. Bill 85 introduced a saving provision which deems a single location to be a separate establishment if there is a permanent discontinuance there which results in 50 or more terminations. This applies only for the purpose of determining the rights of employees terminated at that location.

Severance pay amounts

S.40a(1c) The severance pay to which an employee is entitled under this section shall be in an amount equal to the employee's regular wages for a regular non-overtime work week multiplied by the sum of,

a) the number of the employee's completed years of employment; and

b) the number of the employee's completed months of employment divided by 12,

but shall not exceed twenty-six weeks regular wages for a regular non-overtime work week.

Explanation:

This provision sets out the amount of severance pay to which an employee is entitled. Like the old law, it provides for one week of pay for each year of employment up to a maximum of 26 weeks. But while the old provision rounded down length of employment to the completed *year*, the new provision rounds the length of employment to the completed *month*.

Comment:

- The change more fully recognizes the capital loss incurred by the worker upon termination.

Q: If someone has 10 years, nine months and three weeks of employment, does this individual still only get 10 weeks of severance pay?

A: No. The new provision recognizes completed *months* of employment as well as completed *years* of employment. The employee would qualify for 10 3/4 weeks of severance pay.

Q: How do lay-offs and broken stretches of employment affect the calculation of length of employment for severance pay purposes? I worked for my employer for 6 years, then quit, was rehired 2 years later and terminated after another 4 years. During the last 4 years I was laid off several times for a total period of 1 year. I've now been given notice of lay-off because the employer is reducing operations, which I gather means I will not be considered terminated until 35 weeks after the effective date of the notice.

A: This employee will be considered to have 10 years' employment when he is finally deemed terminated. All time spent as an employee, whether on active service or on lay-off and regardless of whether there were interruptions in employment, counts; thus time spent on lay-off would be included and broken stretches of employment would be added together (although time between the stretches would not be taken into account). The one exception to this is that the 35 weeks between the effective date of the employer's notice and the deemed termination for severance pay purposes would not be counted.

Q: My employer terminated me without notice at a point when I had been employed for 4 years, 11 months and 3 weeks. He says he will not pay me severance pay because I had not been employed for at least 5 years at the time of termination, but I think this is unfair because if he had given me my proper notice I would have met the 5-year qualification. Am I entitled?

A: Yes. In determining length of employment for an employee who was terminated without notice, an amount of time equal to the required notice period is part of the calculation of length of employment.

Q: I was terminated without notice and given pay in lieu of notice. Can my employer set off the amount of pay in lieu of notice I received against my severance pay entitlement?

A: No. Payments provided for lack of notice of termination, whether under the *Employment Standards Act* or otherwise, should not be set off against or deducted from your severance pay.

"Lay-off" defined

S.40a(1) In this section,

> **"lay-off" means a period of at least one week in which an employee receives less than one-quarter of the wages he or she would earn at his or her regular rate in a regular non-overtime work week unless the employee,**
>
> **(a) was not able to work or not available for work,**
>
> **(b) was subject to disciplinary suspension, or**
>
> **(c) was not provided with work by his or her employer by reason of any strike or lock-out occurring at his or her place of employment or elsewhere;**

Explanation:

The provision defines "lay-off" for purposes of section 40a of the Act.

The new definition of "lay-off" is necessary because the definition of "termination" defines the term to include certain "lay-offs".

Basically, a "lay-off" is a period of at least a week in which wages fall below 25 percent of normal weekly wages. The definition does not include weeks in which the employee was unable to work or was unavailable for work, or was on suspension, or was not provided with work because of a strike or lock-out.

Comment:

The definition of "lay-off" here differs from that used for the notice of termination provisions (section 1 of Regulation 286) in that the threshold here is 25 percent of normal earnings, while in the notice provision it is 50 percent. (The exceptions are basically the same.) The difference reflects the view that the concept of termination (and the related concept of "lay-off") should be more stringent in the case of severance pay, since severance pay should signify a more lasting and profound break in the employment relationship.

"Termination" defined

S.40a(1) "termination" means,

(a) a dismissal, including a constructive dismissal.

(b) a lay-off that is effected because of a permanent discontinuance of all of the employer's business at an establishment, or

(c) a lay-off, including a lay-off effected because of a permanent discontinuance of part of the business of the employer at an establishment, commencing on or after the 15th day of June, 1987 that equals or exceeds thirty-five weeks in any period of fifty-two consecutive weeks,

and "terminated" has a corresponding meaning.

Explanation:

The provision sets out a definition of "termination" for purposes of section 40a of the Act. The term refers to:

- a dismissal;
- a constructive dismissal (a resignation that is treated in law as a firing, as when an employee quits because he or she has been forced to by the employer, or because the employer has substantially changed the conditions or terms of employment without the employee's agreement);
- a lay-off where there is a permanent discontinuance of all of the employer's business (for example, a complete closure, or the sale of an entire business); or
- any other lay-off, so long as it started on or after June 15, 1987, and lasts for at least 35 weeks in any 52-week period.

Comment:

- The definition of "termination" is fairly stringent, and stricter than the corresponding definition in the notice of termination provisions. This reflects the view that severance pay should signify a more lasting and profound break in the employment relationship.
- In light of this, the reason for including dismissals and constructive dismissals is obvious: Both represent a permanent severance of employment.
- Where the employer permanently discontinues all of a business, the employee may technically only be put on lay-off, rather than being dismissed, because some components of an employment relationship continue to exist, e.g., recall rights. However, if *all* of the business is permanently discontinued, the lay-off

should be considered a termination because it is clear that the employee will never be going back to work for the employer.

- For lay-offs other than those caused by the permanent discontinuance of *all* of the employer's business, only very lengthy lay-offs should be considered to be tantamount to termination. This is because lay-offs by their nature imply that the employee may later resume working for the employer.

- The 52-week "measurement" period is necessary to prevent avoidance schemes, such as laying an employee off for 34 weeks, then recalling the individual for one week and then laying him or her off again.

- The definition is restricted to lay-offs beginning on or after June 15 because this is an entirely new concept and the "rules of the game" should not be changed for lay-offs which had already started.

Q: I am an eight-year employee and my employer gave me four weeks' notice, specifying a termination date of June 5, 1987. However, he kept me on until June 26 because there was some temporary work available. I told him I should get severance pay because my last day of work was after June 14. But he says that under section 10 of Regulation 286 an employee can be kept working for up to 13 weeks after the notice period expires and the termination date for *Employment Standards Act* purposes is still regarded as the termination date specified in the notice. Accordingly, he says that my termination date under the Act was June 5 and therefore I don't get severance pay. Who is right?

A: You are. While section 10 freezes the termination date for notice purposes, it has no bearing on severance pay. The right to severance pay must be determined according to the definition of termination set out in subsection 40a(1) of the Act. If the termination date thus determined falls after June 14, the employee has an entitlement to severance pay. (Note, however, the section 10 does freeze the termination date for notice purposes. This employee's termination date would be considered June 5 for purposes of section 40 and he or she would have no additional entitlement under *that* section.)

Q: The definition of "termination" for severance pay appears to distinguish between lay-offs which occur because of the permanent discontinuance of *all* of the employer's business at a establishment and other lay-offs including lay-offs caused by the permanent discontinuance of *part* of the employer's business at an establishment. Why?

A: In keeping with the concept that severance pay signifies a lasting and profound break in an employment relationship, it was felt that in non-dismissal lay-off situations, where it is not *clear* whether there has in fact been any permanent severance of the relationship, the lay-off should continue for quite a substantial period of time (at least 35 weeks) before a termination for severance pay purposes should be considered to occur. However, where there has been a permanent discontinuance of *all* of the employer's business at an establishment, then even though the lay-off may not strictly qualify as a dismissal (say because the employee theoretically still has recall rights), as a *practical* matter it is clear that the relationship is through. It was felt that it would be pointless to force an employee in this situation to wait 35 weeks before becoming entitled to severance pay.

Q: If the lay-off began before June 15 but continues for at least 35 weeks after June 15 will it be deemed to be a termination under the 35 week rule?

A: No. Lay-offs which began before June 15 are not covered by the 35-week rule.

(Note, however, that lay-offs which commenced before June 15 might be treated as "dismissals" for severance pay purposes once it is clear that the employment relationship has been ended permanently.)

Q: I was terminated on June 1 by an employer with a payroll of over $2.5 million. The employer has not permanently discontinued all or any part of his business. Am I eligible for severance pay?

A: No. The $2.5 million payroll rule applies only from June 15 onwards.

New severance pay exclusion

Subsection 40a(3) of the Act is a list of exclusions from the right to severance pay. Employees included in the list are not entitled to severance pay. Bill 85 adds a new exemption to the previous list, as follows:

> **(c) an employee who has been guilty of wilful misconduct or disobedience or wilful neglect of duty that has not been condoned by the employer.**

Explanation:

Since severance pay will be payable in cases of individual termination where the employer has payroll of $2.5 million or more, this provision excludes employees guilty of wilful misconduct, or disobedience, or wilful neglect of duty from entitlement to severance pay.

Comment:

Such an exclusion previously applied to entitlement to notice of termination. It was not specified in the previous severance pay provisions because under the previous severance pay scheme (specifically, the restriction to permanent discontinuance situations), the cause of termination had to have been the permanent discontinuance in order for the employee to be entitled.

Employees absent because of illness or injury

Subsection 40a(2) of the Act was a list of inclusions in the right to severance pay; it stated that subsection 40a(1) — the basic entitlement provision — applied to the employees or situations mentioned in the list. Included in the list were employees "temporarily absent due to illness or injury." This has now been replaced with the following:

(c) **an employee who is absent because of illness or injury, if the employee's contract of employment has not become impossible of performance or been frustrated by that illness or injury.**

Explanation:

The new provision replaced the previous clause (c), which included ill or injured employees who are "temporarily absent" in the right to severance pay, and replaced it with a new clause which includes ill or injured employees whose contracts of employment have not been "frustrated".

Comment:

Q: Bill 85 amended the Act by saying, in effect, that an employee whose contract has been frustrated by illness or injury is not entitled to severance pay. What does "frustrated" mean, and why did this concept replace the previous test of "temporary absence"?

A: "Frustration" is a legal term which refers to events or occurrences which have the effect of destroying the basis of a contract. In the context of employment contracts one type of occurrence which may result in frustration is a lengthy absence from work due to illness or injury on the part of an employee. Whether or not an employment contract has been frustrated depends upon a number of factors, including the length of the absence, the length of the employee's employment, the prognosis for recovery, whether the employee was still receiving sick pay, and whether the employee's work could have been performed through provisional measures such as temporary help or other employees "filling in".

It was decided to replace the "temporarily absent" test with the frustration concept for three reasons:

1. Frustration has a clear legal meaning and there have been numerous court and referee decisions which provide guidance as to how to determine whether a

contract has been frustrated, whereas "temporarily absent" is a vague concept which has not been addressed in any significant way by the courts or referees.

2. Frustration is a term which is used elsewhere in the Act (specifically, the statutory notice provisions).

3. The "temporarily absent" concept looked only to the length of the absence and not to other factors such as length of employment; frustration is thus a fairer test to apply in dealing with longer-service employees who may have had serious illnesses or injuries.

Eliminating the 12–month rule on recall rights

S.40a(9) Where the employee elects to maintain the right to be recalled or fails to make an election, the employer shall pay the severance pay to the Director in trust to be paid by the Director,

(a) to the employer, where the employee accepts employment made available under the right of recall and in such case the employee shall be deemed to have abandoned the right to severance pay; or

(b) to the employee in any case other than a case mentioned in clause (a), including the case where the employee renounces the right to be recalled, and, upon payment, the employee shall be deemed to have abandoned the right to be recalled.

Explanation:

This new provision replaces the scheme in the old subsection 40a(9). There is one significant change. Under the old scheme, the right to recall expired after 12 months. If the employee had not been offered work in that time or written to the Director to extend the period, the severance monies held in trust were payable to the employee. Under the new scheme, there is no 12–month limit on recall rights. The employee can retain them as long as they exist under contract and can renounce them at any time.

Comment:

Q: Can an employee get severance pay and still retain recall rights?

A: An employee who is entitled to severance pay is entitled to choose between getting severance pay immediately and losing recall rights, or maintaining recall rights and having the employer pay the severance pay to the Director of Employment Standards in trust. If the employee elects to maintain recall rights, the severance pay is paid back to the employer if the employee later accepts a recall. If the employee at any time has a change of mind and renounces recall rights, or if the recall rights expire, the severance pay is paid out to the employee.

Q: Supposing an employee elects to retain recall rights. If the employer *subsequently* offers reasonable alternative employment, does the employee automatically lose the right to severance pay?

A: The employee who elects to retain recall rights will not lose severance pay except in the specific circumstances set out in the recall rights/election provision. Accordingly, it is only if the employee accepts a recall that the severance pay that has been paid into trust will be paid back to the employer. Refusal to accept the recall will not lead to disentitlement.

Interest on trust monies

S.51a(3) Where under this Act the Director is required to hold moneys in trust, the Director shall pay interest to the person entitled to receive such moneys at the prescribed rate of interest.

Explanation:

This clause provides that the Director will pay interest on monies held in trust. The rate is to be prescribed in the regulations. While this is a new provision, it does not involve a change in policy, because interest is currently paid on such monies.

Comment:

Until a regulation prescribing a rate of interest comes into force, the Director will pay whatever interest is earned on the money either to the employer or the employee, depending on whoever is ultimately entitled to it.

Resignation deemed termination

S.40a(10) Where an employee who receives notice of termination on or after the 15th day of June, 1987 resigns from employment during the statutory notice period and provides the employer with at least two weeks written notice of resignation, the employee shall,

(a) where the employee has been given notice of termination because of the permanent discontinuance of all the employer's business at an establishment, be deemed to have had his or her employment terminated by the employer on the date the notice of termination was to have taken effect; and

(b) in any other case, be deemed to have been laid off by the employer commencing on the date the notice of termination was to have taken effect.

(11) The amount of severance pay for an employee who is entitled to severance pay under subsection (10) shall be calculated on the employee's length of employment up to the date on which his or her notice of resignation takes effect.

Explanation:

Subsection 40a(10) deems those who receive notice of termination from their employer on or after June 15, and who subsequently quit, either to have been terminated (if the notice was given in connection with a permanent discontinuance of *all* of the employer's business) or laid off (in any other case) on the date the employer's notice was to have taken effect, provided that:

- the employee gives at least two weeks' notice of resignation, and
- the resignation takes effect during the statutory notice period.

Comment:

- Because the right to severance pay extends only to those who are "terminated", a quitter would not ordinarily be eligible for it. This could be unfair, since one of the purposes of the employer notice requirement is to give employees advance warning of termination so that they can start looking for new jobs. In the past employees who found a job which started before their old employer's notice expired faced a difficult choice between accepting the new job and losing severance pay or foregoing the new job to get severance pay. Subsection 40a(10) removes this unfairness, by allowing employees who quit after getting notice from the employer to be considered terminated provided they comply with certain requirements designed to ensure that the employer is not jeopardized.

- Those who quit after getting notice in connection with a permanent discontinuance of *all* of the employer's business (e.g. complete closure, sale of entire business) are deemed terminated on the day the employer's notice was to have taken effect. They are thus put in the same position vis-a-vis severance pay as their fellow workers who also received notice but stayed through to the end.

- Those who quit after getting notice in any other situation are simply deemed to have been placed on lay-off on the day the employer's notice was to have taken effect. Once again, the intent is to ensure that they are put in the same position as co-workers who also received notice but stayed through to the end. If they are not re-employed by the same employer before the expiry of 35 weeks, their lay-off automatically becomes a termination under the definition in subsection 40a(1).

- These provisions cover only those quitters who received notice from their employer on or after June 15.

Q: If I quit and I meet all the conditions required in order to be entitled to severance pay, how long do I have to wait to get paid?

A: It depends. Any severance pay owing to an employee must be paid within two weeks following termination. Although you are entitled if you quit and meet all the necessary conditions, *when* you become entitled is a different question. The legislation is designed so that the employee who quits does not become entitled to severance pay any sooner than other other employees who were given notice but who worked through to the completion of the notice period.

Accordingly, if you were given notice because the employer permanently discontinued *all* if his business at a establishment, you are deemed to have been terminated on the date the employer's notice was to have taken effect and you would be entitled to your severance pay in the two weeks which followed.

In any other case, you would be deemed to have been *laid off* on the date the employer's notice was to have taken effect, and you would be deemed to have been terminated 35 weeks later if you were not recalled by the same employer in the meantime. In this situation you would become entitled to be paid the severance pay in the two weeks which followed the expiry of the 35 weeks.

The amended Act allows employers who owe severance pay to apply to pay the money in instalments over a three-year period. If the employer's instalment plan is approved, the timing of the severance payments would be governed by the plan.

Q. I was given notice of termination some time after June 14, 1987, because of a closure of part of my employer's plant. However, I found a new job with another employer and provided two weeks' written notice of resignation, to be effective during the statutory notice period. I expected to become eligible for

severance pay 35 weeks after the employer's notice was to have taken effect. But now, at the 30-week point, my old employer has offered me a job in the part of his plant that continued in operation. If I refuse to take it, will I lose my right to severance pay?

A: Clause 40a(3)(a) of the Act says that an employee who refuses reasonable alternative employment with his employer is not entitled to severance pay. A refusal of reasonable alternative employment prior to the expiry of 35 weeks would lead to the employee not being entitled. In this case, whether the employee is entitled depends on whether the alternative employment was reasonable.

Q: How do you calculate my length of employment if I quit? I received 12 weeks' notice of termination from my employer (which is exactly what was required) and gave two weeks' notice of resignation one week later. When I quit I had 10 years and 4 complete months of employment. But if I had stuck around to the end I would have had 10 years and six complete months of employment. Is my severance pay 10 1/2 weeks' pay or 10 1/3 weeks' pay?

A: Your entitlement would be 10 1/3 weeks' pay. Where an employee quits, length of employment is calculated with reference to the date on which the employee's notice of resignation takes effect.

Severance pay by instalment

S.40a(12) Notwithstanding subsections (1a) and (9) and section 7, where the Minister so recommends, the Director may, on an application by the employer, approve the employer's plan to pay severance pay by instalment and, where such approval has been given, the employer shall be deemed to have complied with subsections (1a) and (9) and section 7.

(13) Where an employer fails to comply with the approved plan and the Director does not approve another instalment plan within thirty days of such failure, all unpaid severance pay shall be deemed to have become due and payable on the date the Director approved the original instalment plan.

(14) No instalment plan shall extend payment of severance pay for a period longer than three years from the date on which such severance pay became due and payable.

Comment:

- These provisions recognize that requiring immediate payment of severance pay may not be appropriate in certain circumstances.
- To apply for approval of a plan to pay severance pay by instalment, an employer would write to the Director of the Employment Adjustment Branch.
- The Employment Adjustment Branch will review the plan and contact the employer if necessary. Once that review is completed, if the Minister is of the view that approval of the plan should be recommended, the Minister will so advise the Director of Employment Standards.

Q: How does an employer apply for approval of a plan to pay severance pay by instalment?

A: The employer should write to the Director of the Employment Adjustment Branch at 400 University Avenue, Toronto M7A 1T7.

Q: What criteria will govern whether recommendation and approval for payment of severance pay by instalment will be given?

A: An important criterion may be whether immediate payment (*i.e.*, in accordance with section 7 of the Act) would jeopardize the future of the employer. However, applications for approval will have to be assessed on an individual, case by case basis.

Q: What if the Director of Employment Standards approves an employer's plan to pay severance pay by instalments and the employer later misses a payment?

A: If the employer misses a payment or otherwise fails to comply with the approved plan, any unpaid severance pay immediately becomes due and payable, and can be enforced through the procedures provided in the Act, unless the employer submits a new plan to the Director of Employment Standards for approval and the Director approves it within 30 days of the missed payment or other failure to comply.

Q: Doesn't allowing an employer who misses a payment to apply for a new approval simply invite abuse?

A: The provision is intended to allow some flexibility where, for example, the employer misses a payment through no personal fault. Employees are protected because, even if a new approval is given, the plan must still provide for payment of all outstanding severance pay within three years of the date on which it *originally* became due.

Union settlement of severance pay claims

S.40a(15) Notwithstanding section 3, where an employee who is entitled to severance pay under this section is represented by a trade union, the trade union may enter into an agreement with the employer which includes a settlement of all severance pay claims, in which case this section does not apply.

(16) The parties to an agreement under subsection (15) shall forthwith notify the Director in writing.

(17) Where there is an agreement under subsection (15), any proceeding under section 50 or 51 to determine severance pay is terminated with regard to the employees represented by the trade union.

Explanation:

A union settlement of severance pay claims will bind the individual members of the bargaining unit. Once the trade union enters into an agreement with the employer, any proceedings commenced under the Act to enforce a severance pay claim are brought to an end.

Note that the amended Act does *not* allow for a union to agree during collective agreement negotiations to forego *in advance* the *possibility* of severance pay in the future for other benefits or higher wages in the present. The severance pay entitlement covered by a settlement must be known before the settlement is made.

Comment:

- A union could use these provisions to substitute an alternative benefit for severance pay.
- If an employee feels that his union has not properly represented his or her interests, he or she may want to consider instituting unfair representation proceedings under the *Labour Relations Act*. However, the settlement will still be binding on bargaining unit members for *Employment Standards Act* purposes.

Q: Why should only unions have the authority to make a severance pay settlement? Shouldn't individuals have this right too?

A: Individuals already have this right under clause 47(1)(b) of the Act. The Bill 85 amendment simply gives unions the right to settle on behalf of the members of the bargaining unit. The only difference is that, in the case of an individual, an employment standards officer must receive any settlement monies on behalf of the employee. This is not necessary where an employee's union makes the settlement.

Part III
Miscellaneous Provisions

Notice of litigation

S.6(2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.

Explanation:

The purpose of this provision is to enable the Director of Employment Standards to seek standing to present the Branch's view of the legislation in court if the lawsuit concerns a section of the Act whose interpretation is in dispute, and to ensure that the Director is informed of legal developments affecting the Act.

"Establishment" defined

S.1(fa)"establishment" means a location at which the employer carries on business, but where the employer carries on business at more than one location, separate locations constitute one establishment if,

(i) the separate locations are located within the same municipality, or

(ii) one or more employees at a location have seniority rights that extend to the other location by virtue of a collective agreement or written contract of employment whereby the employee or employees may displace another employee of the same employer;

Explanation:

This clause sets out a definition of "establishment" for purposes of the Act.

Basically, "establishment" means a location where the employer carries on business. However, two or more separate locations of the employer will be considered a single establishment if:

1) they are in the same municipality, or

2) there are common bumping rights.

Comment:

- The word "establishment" is used in provisions of the Act relating to severance pay, notice of mass termination and equal pay for equal work.
- The word was not previously defined, which led to considerable uncertainty among employers, employees, and unions as to their respective rights and obligations in situations where the employer carried on business at more than one location. The few referee hearings which have addressed the issue have not been very helpful, because the rulings set out very complex tests which are not easily applied to other cases.
- The new definition sets out a single, straightforward test, which looks primarily to geographic proximity (same municipality). It also extends this concept to situations in which the parties have, in effect, treated other locations as one establishment by agreeing that bumping rights extend to these locations.
- The definition is similar to the definition of "establishment" set out in the pay equity legislation, but differs from it in some respects. Each is designed for the special purposes of its own legislation.

Q: What is a municipality?

A: A municipality is the area included in any level of municipal government. It could be a city, town, village, township, or county, or a metropolitan, regional or district municipality. (Guidance on this point might be obtained from the definition of "municipality" contained in the *Ministry of Municipal Affairs and Housing Act*.)

Q: What if two locations are in the same municipality for purposes of one level of municipal government but in different municipalities for purposes of another level?

A: So long as the locations are in the same municipality at one level at least, they are deemed to be one establishment.

Q: What if the two locations are in one municipality but don't have common bumping rights? Are they considered separate establishments?

A: No. If they're in the same municipality, they're considered to be one establishment even if there are not common bumping rights. Common bumping rights are relevant only if the locations are not in the same municipality.

"Employer" defined

S.1(d) "employer" includes,

(i) any owner, proprietor, manager, superintendent, overseer, receiver or trustee of any activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for the employment of a person therein; and

(ii) any associated or related corporations, individuals, firms, syndicates or associations treated as one employer under section 12, where any one has control or direction of, or is directly or indirectly responsible for the employment of a person therein,

and includes a person who was an employer.

Explanation:

The definition of "employer" is changed in three ways.

The words "receiver or trustee" are added to the list of persons who may be considered an employer.

The words "project or undertaking" are added to the list of endeavours in respect of which a person may be an employer, so as to ensure that any unusual or atypical forms of business organisation are covered by the definition.

The definition incorporates section 12 of the Act (the single employer provision) and provides that any corporation, individual, *etc.* of the group of corporations, individuals, *etc.* treated as one employer under section 12 may be treated as the employer under the "employer" definition.

Extending the "single employer" concept

S.12(1) Where before or after this Act comes into force, associated or related activities, businesses, works, trades, occupations, professions, projects or undertakings are or were carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination thereof, and a person is or was an employee of any of such corporations, individuals, firms, syndicates or associations, or any combination thereof, such corporations, individuals, firms, syndicates or associations, or any combination thereof, shall be treated as one employer for the purposes of this Act, if the intent or effect of the arrangement is to defeat, either directly or indirectly, the true intent and purpose of this Act.

Explanation:

Under the previous section 12, two corporations could not be treated as a single entity under the Act unless they were under common control or direction and had both stood in an employment relationship with the employee whose rights were in question. Further, they could not be treated as one unless an employment standards officer in his or her discretion decided it was appropriate to do so.

Under the amended section 12, wherever associated or related businesses are carried on through two or more corporations, they can be treated as one if the *intent* or *effect* of carrying on business through two or more corporations would defeat the intent and purpose of the Act. It will not be necessary to show common control or direction or that each of the corporations was an employer in relation to the employee, and it will no longer be discretionary on the part of an employment standards officer.

Comment:

The new provisions will be used in any situation where the carrying on of associated or related businesses through two or more corporations instead of one is done with the *intent* or has the *effect* of defeating the intent and purpose of the Act. This may be illustrated using the new right to severance pay for employees terminated by an employer with a payroll of $2.5 million or more.

- Consider the case of someone who carries on a growing business through a number of small corporations and who sets up a new corporation every time an existing corporation's payroll starts getting close to $2.5 million, putting any new employees on the new corporation's payroll in an attempt to avoid the $2.5 million severance pay threshold. This is obviously being done with the

intent of defeating the intent and purpose of the Act; accordingly the several corporations could be treated as one and their individual payrolls all added together for purposes of determining whether or not severance pay must be paid to terminated employees.

- Another example would be where several numbered corporations in associated or related businesses, each with payroll of less than $2.5 million, carry on under a single trade name and effectively operate as one so far as the general public and employees are concerned. Even if the motive behind having several corporations instead of one had nothing to do with trying to defeat the intent and purpose of the Act it is clear that this could be the *effect* of the arrangement, and so the corporations would be treated as one and their individual payrolls added together for purposes of determining whether or not severance pay must be paid to terminated employees.

ESB–NB–1597–071

Appendix

EMPLOYMENT STANDARDS ACT

O. Reg 444/87.
Forms.
Made—July 30th, 1987.
Filed—July 31st, 1987.

REGULATION MADE UNDER THE EMPLOYMENT STANDARDS ACT

FORMS

1. (1) An employer who is required to give notice of termination under subsection 40 (2) of the Act shall provide to the Minister information indicated on Form 1.

   (2) The information required under subsection (1) shall be provided to the Minister by delivering the information to the Office of the Director of the Employment Adjustment Branch between the hours of 9 a.m. and 4 p.m. from Monday to Friday.

   (3) Part A of Form 1 shall be posted in the workplace in the manner set out in subsection 40 (2b) of the Act. O. Reg. 444/87, s. 1.

2. A notice under subsection 6 (2) of the Act shall be in Form 2. O. Reg. 444/87, s. 2.

3. This Regulation comes into force on the 31st day of July, 1987.

Form 1

Employment Standards Act

(Subsection 40 (2a))

(Attach additional sheets where necessary)

PART A

Name of Company: _____

Mailing Address: _____

Location(s) where layoffs will occur: _____

Total workforce at each location: _____

1. hourly
2. salaried
3. other

Number of employees affected at each location with anticipated termination dates:

1. hourly
2. salaried
3. other

Economic circumstances surrounding intended terminations:

Prior consultations that have been carried out:

Consultations that are proposed to follow:

Measures you propose to offer to facilitate the adjustment of the affected employees (e.g. extension of benefit plan payments, supplementary unemployment benefits, severance pay, counselling, adjustment committee, early retirement). Indicate which measures are to be provided through existing contractual obligations, existing company policy, statutory obligations, or proposed supplementary measures.

Number of employees expected to benefit from each of the adjustment measures listed above:

1. hourly
2. salaried
3. other

(Provide all available information. Where information is not immediately available, specify date when it will be provided to the Minsiter and posted in establishment.)

Name of Company Official, Title, Telephone Number:

_____ _____

_____ _____

Signature Date

PART A OF THIS FORM AND ANY INFORMATION REQUIRED BY PART A OF THIS FORM SHALL BE POSTED IN THE EMPLOYER'S ESTABLISHMENT IN A CONSPICUOUS PLACE.

PART B

List of affected employees (omitting names) showing age, sex, job classification and length of service. (Provide information separately for hourly, salaried and other employees). Provide all available information and where information is not immediately available, specify date when it will be provided to the Minister.

Name of Company Official, Title, Telephone Number:

_____ _____

_____ _____

Signature Date

Name of Company: _____

Form 2

Employment Standards Act

(Subsection 6 (2))

NOTICE TO DIRECTOR OF EMPLOYMENT STANDARDS OF CIVIL PROCEEDINGS

Plaintiff's Name _____

Defendant's Name(s) _____

Address _____

_____

Court in Which Proceedings Are Being Brought _____

Court File Number _____

Copies of all pleadings must be attached.

_____
Signature

_____
Full Name (Please Print)

_____
Address

O. Reg. 444/87, Form 2